Mediplex of Connecticut, Inc., a wholly owned subsidiary of Sun Healthcare Group, Inc. d/b/a Mediplex of Milford *and* New England Health Care Employees Union, District 1199, AFL–CIO. Cases 34–CA–6677, 34–CA–6747, and 34–RC–1258

October 13, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On May 9, 1995, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, an answering brief to the General Counsel's exceptions, and a reply brief to the Petitioner/Charging Party Union's answering brief to the Respondent's exceptions. The General Counsel filed exceptions and a supporting brief. The Petitioner/Charging Party Union filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

The General Counsel has excepted to the judge's dismissal of an 8(a)(1) allegation that the Respondent's preelection videotape unlawfully disparaged the Union, informed employees of the futility of selecting the Union as their collective-bargaining representative, and threatened employees with loss of benefits if they engaged in protected concerted activity. Contrary to the General Counsel and our dissenting colleague, and for the reasons stated by the judge, we agree with the judge's dismissal of allegations pertaining to this videotape.

It is undisputed that the Respondent acquired the Milford facility about 2 months after the Union had begun its organizing campaign. In the video used in the Respondent's response to the campaign, the Respondent made truthful comparisons between the ''phenomenal'' changes it had made during its short time at Milford and the lack of such improvements by the prior owner during the past years. In our view, the Respondent's ''ought to be given a chance'' statement when viewed in that context, as the judge viewed it, does not constitute a threat of loss of existing or future benefits.

We also agree with the judge that the Respondent's ''bargaining from scratch'' statement merely pointed out some of the hazards and problems in collective bargaining; it was neither alleged nor argued that the Respondent threatened to take away existing benefits and restore those benefits only after a lengthy struggle in bargaining. Furthermore, in making a comparison between the higher nonunion wages at its Windham Hill facility and other union-represented facilities, the Respondent truthfully reported on the contractual rate of progression of wage increases negotiated by the Union at other health care facilities. The Respondent's message to its employees that union representation was no guarantee of better benefits and might result in less desirable benefits, is legitimate campaign propaganda, which employees are capable of evaluating. Such expressions of views are protected by Sec. 8(c) of the Act.[4] Therefore, we find that the Respondent's statements on the video neither singularly nor collectively conveyed the message to employees that union representation would be futile nor did they otherwise violate the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mediplex of Connecticut, Inc., a wholly owned subsidiary of Sun Healthcare Group, Inc. d/b/a Mediplex of Milford, Milford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any reference to the unlawful discharge and notify Katherine Gill in writing

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The administrative law judge inadvertently referred to the Region as having filed charges instead of the Union and also to the Union's vice president as Prisco instead of Pickus in JD at Statement of the Case, par. 3, beginning with ''On September 29, 1994,'' and sec. IV,A,1, par. 10, respectively. We have corrected these errors.

[2] With regard to Objection 1, Member Browning agrees with the judge that this case is distinguishable from *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). Member Browning did not participate in that case, however, and she expresses no view on whether it was correctly decided.

[3] The judge's Order has been modified to include the Board's traditional expunction language and the notice has been conformed to the modified Order.

[4] Sec. 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

that this has been done and that the discharge will not be used against her in any way.''

2. Substitute the attached notice for that of the administrative law judge.

MEMBER BROWNING, concurring and dissenting.

I agree with my colleagues with regard to most of the judge's decision. For the reasons discussed below, however, I would reverse the judge with regard to the Respondent's campaign video, and would conclude that the Respondent, in the video, unlawfully informed employees that it would be futile for them to select the Union as their collective-bargaining representative.

In the video, the Respondent implored its employees to give it a chance to show them the striking improvements in wages and benefits that it could continue to offer them over the wages and benefits granted by the former owner, if the employees refrained from selecting the Union. The Respondent told the employees that, if they were not happy with the changes, they could petition for another election in a year. The video then went on to point out that the Union must ''bargain from scratch,'' and it often takes the Union from 6 months to a year to negotiate a contract, if they achieve a contract at all. Finally, the Respondent informed employees in the video that wages and benefits achieved by the Union at another Employer have lagged behind those that the Respondent has in place for its employees at another, nonunion facility.

Contrary to the conclusions of the judge and my colleagues, I would conclude that, taken as a whole, the message that employees would reasonably take from this video is that it would be futile for the employees to have union representation. The message of the video was that if the employees were represented by the Union, the Respondent would never grant them the same benefits that it would grant, as a matter of course, over the next year, while the employees were ''giving it a chance'' to prove itself to them. In addition, the Respondent strongly implied that it would never grant the employees the same level of benefits that they would receive if they remained unrepresented, as employees at another of its facilities were. At the very least, the Respondent conveyed the message that the employees would have to wait a much longer period of time, while the parties engaged in protracted bargaining, to receive the same benefits as the Respondent's unrepresented employees were already receiving. The combination of these messages creates an unlawful implication that it would be futile for the employees to select the Union as their bargaining representative.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with closure of our facility and loss of jobs if they select the New England Health Care Employees Union, District 1199, AFL–CIO as their collective-bargaining representative.

WE WILL NOT discharge employees because of their membership in or activities on behalf of the above-named Union or any other union, or because of other concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them under Section 7 of the Act.

WE WILL offer Katherine Gill immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings suffered as a result of our unlawful conduct.

WE WILL notify Katherine Gill that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

MEDIPLEX OF CONNECTICUT, INC., A WHOLLY OWNED SUBSIDIARY OF SUN HEALTHCARE GROUP, INC. D/B/A MEDIPLEX OF MILFORD

John S. F. Gross, Esq., for the General Counsel.
Steven Baderian, Esq. and *Steven S. Goodman, Esq. (Jackson, Lewis, Schnitzler & Krupman)*, of White Plains, New York, for the Respondent.
John M. Creane, Esq., of Milford, Connecticut, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. On May 12, 1994, the representation petition in Case 34–RC–1258 was filed by New England Health Care Employees Union, District 1199, AFL–CIO (the Union), which sought to represent a unit of employees employed by a wholly owned subsidiary of Sunrise Healthcare Corporation, Mediplex of Mil-

ford, Inc., d/b/a Mediplex of Milford (Respondent).[1] Pursuant to a stipulated election agreement, an election was conducted on July 28, 1994. The results of the election were as follows:

Approximate number of eligible voters	154
Void ballots	30
Number of votes cast for labor organization	62
Number of votes cast against participating labor organization	57
Number of valid votes counted	119
Number of challenged ballots	39
Number of valid votes counted plus challenged ballots	128

Challenges are sufficient in number to affect the results of the election

On August 4, 1994, Respondent filed timely objections to the conduct of the election and to conduct affecting the results of the election. On October 4, 1994, the Regional Director for Region 34 of the National Labor Relations Board issued a report on challenged ballots and objections filed by Respondent and determined that the challenges and remaining objections raised substantial and material issues of fact finding credibility which would be best resolved at a hearing before an administrative law judge. One objection alleged an assault upon Respondent's attorney by the union vice president near the polling area immediately before the election. Respondent excepted to the Regional Director's determination that the challenged ballot of employee Nancy Smith raised issues of credibility, arguing that it previously requested withdrawal of its challenge to Smith's eligibility. The Board denied Respondent's exception.

On September 29, 1994, pursuant to a charge filed by the Region, the Regional Director issued a complaint and notice of hearing in Case 34–CA–6677 alleging that Respondent violated Section 8(a)(1) and (3) of the Act by terminating its employee Katherine Gill. On October 25, 1994, pursuant to a charge filed by the Union, a complaint and notice of hearing issued in Case 34–CA–6747 alleging that from July 15 through 28, 1994, Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union membership, activities, and sympathies; threatening employees with loss of benefits; and, in a videotape shown to employees, disparaging the Union, making statements of futility and threatening employees with loss of jobs if they engaged in protected concerted activity. At the trial, counsel for the General Counsel moved to amend paragraph 8(c) of the complaint in Case 34–CA–6747 to read ''(c) Threatened employees with loss of benefits if they selected the Union as their collective bargaining representative'' in place of ''Threatened employees with loss of jobs if they engage in protected concerted activity.'' The motion was granted.

Respondent filed timely answers to the complaints and denied committing any violation of the Act.

By the Regional Director's order dated October 4, 1994, Cases 34–CA–6677 and 34–RC–1258 were consolidated for trial and by the Regional Director's order dated October 25, 1994, those cases were further consolidated with Case 34–CA–6747 for trial.

The issues raised by these pleading were tried before me at Hartford, Connecticut, on November 14–16, 1994, at which time all parties were afforded full opportunity to adduce relevant testimonial and documentary evidence, to examine and cross-examine witnesses, to argue orally or to file posttrial briefs. The parties elected to file written briefs which were received by me on December 20 and 23, 1994. Further, pursuant to agreement of the parties, the Respondent was permitted to submit a posttrial exhibit of documentation relative to the payroll records of challenged voter Mary Smith as Respondent's Exhibit 7. That exhibit, having been received and there being no objection thereafter raised to it, is hereby received and incorporated into the record.

On the entire record in this case, including my evaluation of documentary evidence, the testimony of witnesses and my evaluation of witnesses' demeanor, and in consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a corporation with an office and place of business in Milford, Connecticut, herein called its facility, has been engaged in the operation of a sub-acute health care institution. During the 12-month period ending September 30, 1994, Respondent, in conducting that operation, derived gross revenues in excess of $100,000 and, for the same period, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Connecticut.

It is admitted, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

The issues, as framed by the General Counsel's pleadings and argumentation, are as follows:

Did Respondent, by its administrator, John Kevin Prisco, violate Section 8(a)(1) of the Act on or about July 15, 1994, by interrogating employees about their union membership, activities, and sympathies?

Did Respondent, by Administrator Prisco, violate Section 8(a)(1) of the Act on or about July 15, 1994, by threatening employees with loss of benefits if they selected the Union as their collective-bargaining representative?

Did Respondent, by Administrator Prisco, violate Section 8(a)(1) of the Act on or about July 21, 1994, by threatening employees with loss of benefits if they selected the Union as their collective-bargaining representative?

[1] At the trial, the complaint in Case 34–CA–6677 and the petition in Case 34–RC–1258 were amended to reflect the correct name of Respondent, which is as set forth in the complaint in Case 34–CA–6747.

Did Respondent, in a preelection 17-minute videotape shown to employees on or about July 21, 1994, violate Section 8(a)(1) of the Act by:

(a) Disparaging the Union?

(b) Informing employees that it would be futile for them to select the Union as their collective-bargaining representative?

(c) Threatening employees with loss of benefits if they selected the Union as their collective-bargaining representative?

Did Respondent, by its nursing supervisor, Jane Buzak, violate Section 8(a)(1) of the Act on or about July 28, 1994, by threatening employees with plant closure and loss of jobs if they elected the Union as their collective-bargaining representative?

Did Respondent violate Section 8(a)(1) and (3) of the Act by terminating its employee, Katherine Gill, on or about August 3, 1994?

B. *Background*

Prior to June 24, 1994, the Mediplex Group operated several health care facilities, one of which was located in Milford, Connecticut. That facility is the only one involved in this case. On June 24, 1994, the Respondent acquired Mediplex of Milford by means of a corporate merger. The acquisition had been preceded by the inception of organizing efforts by the Union among certain of Respondent's service and maintenance employees in April 1994. Union Vice President David Pickus was assisted in the effort by Union Agents Alexandra Ferrara and Albert Cioffari. They, in turn, communicated with employees of whom the more receptive formed an employee organizing committee of about 25 to 30 persons. The employee committee-members solicited their coworkers for support by asking them to sign union representation authorization cards, to wear union logo button pins on their clothing which they also distributed to others, and to accept and read union literature which they also distributed to coworkers. The committee also conducted weekly organizing meetings. The activity of the committee was overt, and Respondent concedes awareness of the prounion activity of committee-member Katherine Gill.

The first most prominent display of union activity was the May 11, 1994 march of about 30 to 50 employees, led by Pickus with Gill at the forefront, to the facility's administration office to demand recognition of the Union as bargaining agent. The administrator at that time, Regina King, declined that demand. The representation petition was filed with the Regional Office the next day. Shortly thereafter on May 23, King was replaced by John Kevin Prisco as the new administrator. Prisco was no stranger to organizing efforts in past administrator assignments to other Mediplex Group facilities and, as of the trial, he had been transferred to act in the same capacity at yet another Respondent facility at which a petition for representation was blocked by an unfair labor practice charge. There was no evidence of prior specific union animus by Prisco, nor citation of any adjudication of past unfair labor practices where he had been a responsible agent. Because of his past experience and his exposure to the ongoing advice of Respondent's legal counsel during the Union's campaign at Milford, however, he had acquired some knowledge of the permissible ways of resisting the organizing effort.

Other managerial or admitted statutory supervisory persons whose identity is of concern to this case at that time were John Colenda, Respondent's eastern division vice president; Mike Teeley, Respondent's senior vice president/human resources; Priscilla Van Heinengen, Respondent's eastern division director of human resources who held the same position for the Mediplex Group; Leslie MacLeman, Milford facility laundry and housekeeping supervisor until she resigned on September 8, 1994; and Jane Buzak, a relief nursing supervisor.

On June 7, 1994, the Regional Director approved a stipulated election agreement entered into by the parties under which an election was subsequently scheduled for July 28.

A second march upon the Milford administration office occurred about 4 weeks after the May 12 petition filing according to Cioffari, on June 9 according to Gill, or on June 2 according to Prisco. At that time Pickus led a group of 35–40 employees of whom Gill was again at the forefront. They confronted Prisco at his office and, according to Gill's testimony, again demanded recognition. In view of the pending voluntary stipulated agreement, the purpose of the second march is not entirely clear.

The Respondent, with the advice and assistance of onsite counsel, waged a campaign to discourage a union election victory. The employees were strongly, openly divided on the issue. Many wore union buttons and many who opposed the Union wore ''Give Sun a chance'' buttons. In the laundry and housekeeping department where Gill was employed, not only Gill but other employees wore union buttons.

Gill's vote was challenged by the Respondent on grounds that she was a temporary employee. Gills' scheduled day off was the day before the election, which time she used to distribute prounion literature to employees. On her next scheduled working day, August 3, when she was ill at home with an ear infection, she was informed by telephone call from her supervisor, MacLeman, that her 120-day status as a temporary employee had ended and she was therefore terminated. Gill claims that she was employed on a permanent basis and not a temporary basis. The General Counsel argues that even if Gill were to be considered as a temporary replacement for another employee, as argued by Respondent, her termination was accelerated for discriminatory reasons far in advance of the return of the incumbent employee who, indeed, had not returned even as of the date of the trial. Respondent argues that Gill was terminated pursuant to a 120-day temporary employment limited policy established by the predecessor Mediplex and the economic lack of need for its extension.

Testimony in support of the complaint allegations was obtained from Cioffari and five employee witnesses, i.e., Gill, her sister, Charlotte Ricci, who also happens to be the employee she had been hired to replace and who was instrumental in Gill's hiring and unit employee Alice Booth (who is Gill's niece), MacLeman, the former supervisor who testified that her resignation was the ''best career move'' she had ever made and dietary and/relief cook Jennifer Toth.

C. *Alleged Unlawful Preelection Interference*

The allegations of independent violations of Section 8(a)(1) of the Act, i.e., coercive interference with employee

Section 7 rights are contained in complaint paragraphs 7, 8, and 9. The totality of testimony adduced in support of those allegations consists of the testimony of two witnesses, Booth and Toth. Of the 154-person voter group, not even alleged discriminatee Gill herself was called on to augment or corroborate this testimony. Toth testified to one incident encompassed by complaint paragraph 7. A videotape is the premise for paragraph 8, and Booth was the sole support for one of the two incidents alleged in paragraph 7 and the single incident alleged in paragraph 9.

1. Coercion of Alice Booth by Prisco

It is alleged in paragraph 7 that Prisco interrogated and threatened loss of benefits for employees in the facility main dining room on July 15, 1994, and that, on July 21 in the private dining room, he also again threatened employees with loss of benefits if they selected the Union as their bargaining representative. As of the time of trial, Booth was employed by Respondent at its Milford facility as a part-time certified nurses assistant. She was included on the eligible employee voter list, a/k/a ''*Excelsior* List,'' and voted in the election. Booth had been on maternity and medical leave starting in late August 1993, and she returned to work in late June or early July 1994. Booth testified that she engaged in a conversation in the facility main dining room with Prisco 1 week before the July 27 election. She identified two other certified nurses aides as present. However, they did not testify.

Booth's description of the conversation was very brief and given without much explanatory context. It is not clear whether the other two employees were part of the conversation or not. Booth is not certain how the conversation started. She ''believed'' Prisco started by saying something. When asked what Prisco said ''at that time,'' she testified that Prisco asked her how she ''felt about the Union and everything going on.'' She testified that she responded that she ''really didn't have an opinion'' because she had just returned from maternity leave. Booth also recalled that Prisco told her about a scheduled pay raise that would not be affected by the outcome of the election.

When questioned further in direct examination, she also recalled: ''[W]e talked about the open door policy.'' When asked, ''[W]hat was said about that,'' she testified:

> That if they go in, there really wouldn't be an open door policy. We'd have to have somebody with us to go into the office or, you know.

Then she was asked by counsel for the General Counsel ''[D]o you recall if Mr. Prisco said something to you?'' She answered: ''if the Union got in, we'd have to have like a steward or whatever.'' Booth could recall nothing further of the conversation.

Thus we have the contest-free, cryptic, selective, generalized recollection of Booth wherein she did not even, at first, identify Prisco as the one who used the term ''open door policy.'' She did not make it clear whether the two other employees participated in the conversation and if they did so, what they may or may not have said about an ''open door policy,'' i.e., she testified: ''I remember *we* talked about the open door policy,'' and then she went on to relate ''what was said about it.'' Not only is there no context for this '''open door discussion,'' it is not clear whether or not there was some conversation that led up to the alleged interrogation either by her or the two other employees, i.e., were they expressing prounion sentiments or discussing the oncoming election before Prisco made his comments?

There is no allegation of the complaint related to the pay raise. Certainly, there was no threat in relation to the pay raise even according to Booth.

Booth admitted that neither in documents or in a verbal manner has she ever previously heard at the facility the phrase ''open door policy.'' On the contrary, she described familiarity with the phrase ''chain of command,'' although she recalled that the previous administrator, King, had told her to ''feel free to come to me.''

Prisco denied having ever used the phrase ''open door policy.'' He admitted to having had a conversation with Booth wherein the consequences of union representation were discussed, i.e., that employees will have a shop steward who will discuss problems with the administration. He denied that he told Booth that she must necessarily resort to the steward, but rather told her and others that a union will often select as stewards those employees who were most active on its behalf in the election campaign and that the Union would encourage her to avail herself of the steward's help. This additional context provided by Prisco was not effectively rebutted. In cross-examination, Booth could not recall whether Prisco made reference to contract negotiation but denied that Prisco referred to a ''steward.'' She denied that Prisco told her about a steward and grievances. She testified:

> I assume that's what he meant by we wouldn't be able to go to a—you know, there wouldn't be an open door policy where I myself would be able to go in alone. We would have to have somebody with us from the Union.

She then testified Prisco said, ''[S]omeone from the Union would have to be with you.'' Prisco did not clearly deny the ''interrogation,'' such as it was, described by Booth.

The General Counsel argues that Booth was coercively interrogated and that the loss of the open door policy was a threat of loss of benefits, i.e., the statutory right of employees to present and adjust grievances directly under certain conditions as set forth in Section 9 of the Act, e.g., provided ''that the bargaining representative has been given opportunity to be present at such adjustment.'' *C. J. Mfg. Co*., 238 NLRB 1388, 1392 (1978).

With respect to the reference to the open door policy, even as described by Booth's testimony alone, I find insufficient clarity of recollection and context upon which I can find that such threat occurred. Given Prisco's somewhat more detailed, ineffectively unrebutted contextual explanation, and Booth's lack of certitude in recollection and demeanor, I credit his version of the conversation and his denial that he told her that her only recourse for resolution of a grievance was through the Union or its stewards.

With respect to the alleged interrogation, I find that the lack of clarity in testimony and lack of detailed context precludes me from finding that a coercive interrogation had occurred.

2. Coercion of Alice Booth and other employees by Buzak

Paragraph 9 of the complaint alleges that on July 8, a supervisory relief nurse, Buzak, threatened employees with ''plant closure'' if the Union became their bargaining agent.

Booth testified that on July 28, after there was a rumor that a group of employees was so unhappy about the result of the election, they had gone to the facility office and had threatened to quit to avoid paying union dues. Booth testified that her entire shift was opposed to the Union and were all threatening to quit. She further testified that nurse Betsy Smith had told her and other prounion employees that she hoped they were happy with the prounion vote which would result in the facility's closure and reopening under a different name and the rehiring in 30 days of only antiunion employees.

According to Booth, she approached Buzak on the evening after the election outside the first floor small dining room in the east wing and confronted her with Smith's statement. Booth identified three other certified nurses assistants, her coworkers, as being present. She did not explain her definition of ''present,'' i.e., hearing range or physical proximity. She did not explain what, if any, was their participation, what they were doing there nor how they came to be present. None of them testified. Booth testified that after she reiterated Smith's comments to Buzak, the latter ''shrugged me off and she said, 'that's been the plan.''' At further direct examination, Booth testified variously that she ''guessed'' and she ''believed'' that Buzak also said that it had been the plan ''since they started the Union activity.'' Booth testified that Buzak gave the appearance of not wanting to talk to her as she immediately thereafter turned and walked away.

Buzak in her testimony tended to characterize herself as having been ''neutral'' or disinterested in the preelection campaign because she had focused upon her own duties as a nonunit staff nurse and relief supervisor. In cross-examination, after initial evasion, she admitted that she wore the ''Give Sun a chance'' button along with other vote-no advocates and had attended supervisor meetings dealing with the election. Her testimony with respect to the Booth confrontation does not constitute a clear, straightforward denial. Instead, the denials are varied with and qualified by such phrases as ''No, I don't recall it,'' and ''I don't remember saying anything like that.'' At one point, a categorical denial was only elicited after I had to explain to the witness the difference between a categorical denial and one conditioned upon a nonrecollection of the event. Her testimonial revision to a categorical denial at that point was far from convincing. That type of testimony, coupled with lack of certitude and conviction particularly as to such a striking episode involving the prospect of a facility closure, leads me to credit Booth. I find that Respondent, by admitted Supervisor Buzak's confirmation of an employee propagated threat of closure because of the successful union vote, at the very least to Booth if not to other employees present, constituted coercive conduct in violation of Section 8(a)(1) of the Act.

3. Coercion of Jennifer Toth and other employees

Paragraph 7(b) of the complaint alleges that on about July 21, 1994, Prisco threatened employees with loss of benefits if they opted for union representation. At the time of the trial, Jennifer Toth had been employed by Respondent for over 2 years for the most part as a dietary aide/relief cook. She was 1 of 89 employees who signed the Union's preelection leaflet which urged coworkers to vote for the Union. She testified that she attended three employer-conducted employee meetings prior to the July 28 election, apparently the most significant of which occurred on July 21 in the facility's private dining room with 7 to 10 other kitchen workers presided over by Respondent's Eastern Division Vice President John Colenda, Teeley, and Prisco, at which they viewed Respondent's propaganda videotape.

According to Toth, Prisco began the meeting by describing a new health insurance coverage to be instituted on about October 1 by Respondent, i.e., a ''flex benefits package'' with an HMO option. Toth testified: ''[Prisco] told us if we were in the Union, we could not have it.'' Her prompted recollection of the balance of what was stated was fragmented and cryptic. She testified, without specifying which manager, that ''they made a statement about the Union not being able to get a contract for a long time. I didn't recall how long they said.'' She made some obscure reference to some kind of Respondent campaign literature being distributed at the meeting.

Toth's examination by both the Union and Respondent elicited a variety of failures of recollection. With respect to the video, she could not recall whether or not employees asked questions or whether questions were even solicited. She recalled that at one prior meeting Teeley explained the new Sun health insurance plan but she could recall nothing about the other prior meeting. She could not recall that Prisco explained his comments regarding noninsurance coverage in the event of union representation. She could not recall if he talked about the negotiability of benefits. According to her, Prisco just seemed to utter a one sentence proclamation of insurance benefit loss. She could not recall if Colenda spoke. She could recall nothing further about the reference to how long it would take to negotiate a contract. Nor could she recall if the employees were told that Respondent intended to negotiate with the Union. Then she testified that Prisco did not use the word ''negotiate.'' She could not recall where Prisco said the contract would come from, however, and could not recall if he referred to ''bargaining.''

Prisco testified that such a meeting did take place on July 21, but that it was Teeley who described and discussed Respondent's new health insurance coverage which was then being implemented at its facilities in Washington State as part of an intended nationwide implementation to be effected by October 1, 1994. Prisco testified that Teeley told the employees that if the Union were elected as employee bargaining representative that the plan would be subject to negotiations like all other benefits. He did not ''recall'' Teeley saying that if the Union got in, the employees would not get the new benefits. Such statement, however, is wholly inconsistent with or at least ameliorated by the statement that implementation of those insurance benefits would be subject to negotiations. Prisco categorically denied saying to the employees that the Union would not be able to get a contract for a long time. The subject of negotiations and the prospect of contractual achievement were covered by the videotape, and it is thus unlikely that Prisco would have deviated from the videotape campaign technique.

Thus we have two versions of an incident, neither of which are corroborated by the 9 to 12 other persons present and neither of which is totally satisfactory. The General Counsel has the burden of moving forward with clear, unconvincing, credible testimony to support his allegation. Whatever credibility vulnerability that may have afflicted Prisco, Toth did not at all give evidence of conviction and certitude. She was extremely hesitant, reticent, and completely lacked spontaneity. Her testimony was cryptic, fragmented, selective, and unsupported by detail and context. I have no confidence that her recollection of the July 21 meeting was not a fusion of impressions and conclusions she gained from all three meetings and the video. Furthermore, Prisco's account is more probable. The corporatewide representative, not the local administrator, was more likely to have discussed the new corporatewide insurance plan in which he was intimately involved. Inasmuch as the subject of the videotape to be presented next, there was no need for Prisco to discuss benefits. Accordingly, I find that I cannot rely upon the testimony of Toth with sufficient confidence upon which to premise a finding of violative conduct as alleged in paragraph 7(b) of the complaint.

4. The preelection videotape

Paragraph 8 of the complaint, as amended, alleges that on July 21, 1994, Respondent violated the Act by exhibiting to its employees during the preelection period a videotape which:

(a) Disparaged the Union.

(b) Informed employees that it would be futile for them to select the Union as their collective bargaining representative.

(c) Threatened employees with loss of benefits if they engage in protected concerted activity.

The videotape which was shown to employees at preelection meetings about a week before the election commences with a pleasant sounding female narrator's explanation of the incoming NLRB vote which she summarizes as an opportunity for the employees to vote for the Union or to vote to give Sun (Respondent) a chance to prove that the employees do not need union representation.

Next Teeley appears and speaks as he and Prisco do at separate, various intervals in quiet, softly modulated tones. Teeley describes the growth of Sun from 25 to 125 facilities in 20 States in 1 year. Prisco then appears to state that what Sun has done at Milord in weeks is ''phenomenal'' compared to what Mediplex had done in years. Teeley states, inter alia, that Sun values employees and listens to employees. He thereafter describes Respondent's nonunion facility which it has operated for 5 years at Windham Hill, Connecticut. Short clips appear thereafter containing statements of purported employees extolling the pay and work conditions at Windham Hill and the lack of need for union representation there. Teeley describes the pay rates at Windham Hill.

The narrator next visually emerges to explain that a union organizing effort precludes Respondent from making promises of benefits and that Sun is not implying that the Milford employees would get the same benefits as the Windham Hill employees presently receive. The record of Windham Hill pay and benefits are praised. The question is posed as to why the Union filed a representation petition at the Milford facility. Prisco and Teeley again appear and they alternatively explain that Mediplex had ''problems'' that caused ''intolerable conditions'' to which the Union responded, and that those problems were such that Sun would not tolerate as the new owner. Prisco then remarks that Sun, for example, has hired needed nurses aides to bring them to an ''acceptable level.''

Teeley next states that the differences between the Mediplex operation and the Sun organization operations which the employees are going to see over the coming months will be ''striking.'' He then states that Sun believes in investing in people and management and ought to be given a ''chance.''

The narrator returns to explain that a collective-bargaining agreement is not automatic, even in situations where the employer owns other unionized plants where contracts have been in place. She states ''in most cases the Union must bargain from scratch,'' which she points out often takes a period of 6 months to a year to achieve. She states that in the meantime, ''new benefits and policies'' cannot be put into effect and that in some cases a union may fail to reach any contractual agreement.

The narrator next comments that unions often promise to obtain for newly organized employees the benefits they had obtained in collective-bargaining agreements for other bargaining units at other employers' facilities. The narrator then asks the viewer to compare the Union's ''track record'' at St. Elizabeth's (another health care facility employer) where it took 5 to 7 years to obtain the benefits it had obtained in its other older contracts at other locations. She states that the Union was certified as bargaining agent at St. Elizabeth's in 1992 but that by 1997, the collective-bargaining agreement there will still not achieve the average wage level currently provided by Respondent at the nonunion Windham Hill facility. Other union-negotiated contracts are unfavorably compared to the current wage levels at Windham Hill and shown to be significantly less than the percentage of pay raise given by Sun within the first weeks of its ownership of the Milford facility.

The narrator points out that a union can only resort to a strike if it fails to obtain agreement in negotiations in order to obtain its bargaining goals. She states that strikes are not inevitable, but she points out the possibility of lawful striker permanent replacements. Thereafter, we see a series of short clips of purported employees who characterize their strike experiences, e.g., striking employee insensitivity to patient needs.

The narrator asserts that the Union has a history of strike violence and cites a 1973 strike at the ''New York League of Voluntary Hospital and Nursing Homes,'' where she claims that 20 patients died and, after which, resulted in subsequent Federal legislation which requires prestrike notice.

Another series of clips contain statements of purported employees who refer to undated strike incidents involving yelling and name calling. One such purported employee emotionally sets forth the personal opinion that the Union's ''big thing is to try to instill fear . . . . 'We know where you live. We know where your children are. We'll get those kids. We'll get you.''' The speaker does not explain whether the statement is supposed to be a quotation of a union agent or whether it is an attitude she is inferring from other conduct

to exist in the mind of the Union's agents. Another purported employee describes how a car was surrounded by strikers.

The moderator appears and, in a serious but not histrionic tone, refers to a strike at ''Harbor Crossing'' where a 67-year old woman died of a heart attack shortly after viewing her new automobile being vandalized by strikers. The woman's adult daughter is purportedly quoted as saying: ''Those bastards they killed my mother.''

The moderator then describes how three strike-affected facilities represented by the Union were later shut down. Interspersed during these spoken commentaries are views of newspaper articles headlining accounts of violence during strikes conducted by the Union.

The narrator states in a clear, controlled, moderate tone that Respondent does not say that if the Union is designated a bargaining agent that such episodes will happen at the Milford facility, but she points out that ''strikes are always possible'' and that representation by the Union is ''no guarantee'' of job security, better wages, or a collective-bargaining agreement. The narrator then states that Sun wants 1 year to prove ''you can be happy without a union,'' and ensures the viewer that another election can be requested in 1 year.

Next, Teeley appears to state, in again a moderate tone, that ''we'' do not need an adversarial relationship, that ''we'' do not need employees to be enemies but rather prefer a partnership for quality of patient care. After innocuous comments by Prisco, Teeley appears to assure the viewer that Sun is an organization that believes in investing ''in people,'' ''in equity,'' and ''in quality management,'' and that it is an expanding enterprise which plans no ''downsizing.''

Finally, the moderator appears to tell the viewer, again in a serious but not hysterical tone of voice, that if the Union is certified as bargain agent, it could well take 4 or 5 years to be rid of it. The viewer is urged to vote for ''what best suits you personally'' and to keep the viewer's ''option open,'' but to vote the right choice, i.e., no.

The General Counsel insisted at trial that disparagement of the Union was in and of itself unlawful. In *Sears, Roebuck & Co*., 305 NLRB 193 (1991), however, the Board stated:

> [W]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1) [of the Act].

That case involved ''flip and intemperate remarks'' of a manager, with respect to the likelihood of a union resorting to leg breaking to collect dues, to be his personal opinion which it held to be protected under the free speech provisions of Section 8(c) of the Act.

In *Optica Lee Borinquen, Inc*., 307 NLRB 705, 709 (1992), the Board adopted the decision of the administrative law judge which found as not violative an employer's agent's comments to the effect that a union, as designated bargaining agent, would replace reason with force and which, having nothing to lose, would cause strikes and strike violence. The judge pointed out in his decision adopted by the Board the following:

> Under Board policy, the mere mention that strikes are possible,[8] or the characterization of union leaders as having nothing to lose, or prone to violence and the use of force to achieve their objectives[9] will not alone remove campaign propaganda from the protective guarantees of Section 8(c). In the final analysis, the references to strikes and force in this letter was an attempt to draw upon emotionalism and overstatement, but merely produced an overall message easily recognizable as self-serving hyperbole.
>
> Argumentation of this type is left routinely to the good sense of employees. See, e.g., *Auto Workers (Kawasaki Motors) v. NLRB*, 834 F.2d 816, 822 (9th Cir. 1987). Accordingly, it is concluded that the letter did not suggest that strikes and violence were inevitable consequences of unionization under conditions violative of Section 8(a)(1) of the Act.

[8] *McCarty Processors*, 292 NLRB 359 (1990); *Agri-International*, 271 NLRB 925, 926 (1984).

[9] *Clark Equipment Co*., 278 NLRB 498, 499–500 (1986); *Central Broadcast Co*., 280 NLRB 501, 502 (1986); *Associacion Hospital Del Maestro*, 272 NLRB 853, 857 (1984).

In a more recent case, cited by the General Counsel, two of a three-person Board panel adopted an administrative law judge's finding that certain employer statements and certain employer conduct ''disparaged and undermined'' a union and thus violated Section 8(a)(1) of the Act. Then Chairman Stephens disagreed. *Sheraton Hotel Waterbury*, 312 NLRB 304 fn. 3 (1993). The two-person majority found that the employer ''disparaged and undermined the Union in the eyes of the employees'' and thus violated Section 8(a)(1)of the Act. The employer in that case seized upon an incident between a union agent who, upon being rebuffed for solicited support in the home of an employee, allegedly obliquely implied injury to the employee's home and family, i.e., ''it would be a shame if something happened'' to the employee's house. The employer, being informed of the incident, circulated a letter to employees accusing the Union of widespread threats and acts of intimidation. He also arranged for the 24-hour patrolling of the place of employment, i.e., a hotel, by police officers. The judge found as fact no documented threat to the hotel and he held further that the employer used the incident to make a ''dramatic, inflammatory and largely unfounded attack on the Union's credibility,'' *Sheraton Hotel Waterbury*, supra at 338. Neither the judge nor the Board discussed the *Sears* or *Optica Lee* decisions, nor Section 8(c) of the Act.

The General Counsel at trial explicitly stated that he in no way is claiming that the content of the videotape contained any factual misrepresentation. He does not claim so in his brief. The Union is silent on the issue and, in its brief, adopts the position of the General Counsel set forth in the General Counsel's brief with respect to the unfair labor practice issues. With respect to the disparagement theory of violation, the General Counsel argues:

> [T]hat portion of the videotape which reviews the Union's involvement in allegedly violent strikes is clearly meant to disparage the Union or its representatives in the eyes of employees.

The General Counsel argues further that the references to alleged fear techniques of the Union and the death of a 67-year old woman were calculated to undermine employee support and constituted such emphasis on violence as ''to create a fear-for-your safety [and the safety of your children] men-

tality among the employees,'' and effected unlawful disparagement.

The problem with the General Counsel's analysis is that unlike the *Sheraton Hotel Waterbury* case, the Respondent here is not alleged nor proven to have inflamed the fears of potential votes by engaging in conduct and by making false pronouncements which are sought to create an image of an immediate, real, and direct threat to their physical safety at their place of employment during the election campaign. Unlike that case, the Respondent here was not alleged nor proven to have engaged in an unfounded or even exaggerated attack upon the Union's credibility. Instead, the Respondent engaged in what it purports to be is an accurate exposure of the Union's involvement in postcertification and postcontract bargaining impasse strikes where violence had occurred and points to the voter the question whether the voter wants a bargaining agent with such record. There is no challenge here to the accuracy of those claims. In effect, the General Counsel is arguing that an employer may not make nasty references to a labor organization's involvement with violence affected strike activity regardless of the truth of those claims because it will upset the tranquillity of the voter who might not want a representative with such an unfortunate history. It is the very essence of election campaigning, however, to convince the voter not to support the other party. Involved in that process is by necessity an objective to undermine support for the other side, which in turn frequently involves disparagement of its position or its abilities. As noted in the *Sears* case, the Board no longer involves itself in the monitoring of the truth or falsity of preelection campaign propaganda.

There is nothing in the videotape which suggests that the voters were in any imminent danger to their person or property during the election campaign or could be necessarily thereafter, should a strike occur. Rather, they were advised that strikes can occur upon bargaining impasse and that as a fact of life, strikers can become extremely unpleasant, nasty, and even violent. I conclude that the General Counsel's theory of violation would preclude Respondent from making any reference to the Union's involvement in past violence-afflicted strikes as a consideration by the voter for its choice of bargaining agent regardless of accuracy. As such, I find that it unduly limits Respondent's free speech rights recognized under Section 8(c) of the Act. Accordingly, I find no unlawful disparagement in the videotape.

The General Counsel alleges that the videotape intended to and did convey the impression of futility of union representation. He argues that it did so by the ''bargaining from scratch'' statement, the ''six months to a year'' referred to as sometimes needed to conclude a contract negotiation, and by the reference to the St. Elizabeth's contract. The latter, he argues, compared the current Windham Hill wages as in excess of the St. Elizabeth's wages in 1997. The General Counsel also cites the reference to the first week's pay raise at Milford by Sun being double the percentage wage raise obtained by the Union in one of its contracts at another health care facility. Finally, the General Counsel cites the reference to a wage gap claimed between the Windham Hill facility and union contracts and the videotape narrator's conclusion, ''and the Union will continue to fall further behind.'' The General Counsel argues that these references create the message that if the Union becomes bargaining agent

> it will take a long period of time to get a contract, if one is secured at all; and that, even if a contract is secured, the wages will be lower than what Respondent would be in the absence of the Union, and the Union will never catch up.

In support of his argument that Respondent's thus characterized message is violative of the Act, the General Counsel cites *Shaw's Supermarkets*, 289 NLRB 844, 848 (1988). That case involved an intended message to employees that the employer would engage in regressive bargaining, i.e., that collective bargaining begins with a loss of existing benefits and proceeds to a ''struggle'' to get those benefits restored. Similar messages were found unlawful in other cases. *Dlubak Corp.*, 307 NLRB 1138, 1145 (1992); *Sivalis*, 307 NLRB 986, 1002 (1992). In *Heartland of Lansing Nursing Home*, 307 NLRB 152, 156–158 (1992), the message was that the employer would start at ''ground zero'' and never give more. In *Forest City Grocery*, 306 NLRB 723, 729 (1992), the flaw in the employer's dismal prognostication was its statement that it would be its own actions that would preclude contract agreement.

In *Bi-Lo*, 303 NLRB 749, 750 (1991), the Board stated that in evaluating ''bargaining from scratch'' comments that a distinction must be made between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the Union will have to bargain to get them back. The Board cited, inter alia, the case relied upon here by Respondent, *Histacount Corp.*, 278 NLRB 681, 689 (1986). The Board noted in *Bi-Lo* that the employer, in effect, expressed opinions in its message which it found to be lawful, i.e., contract negotiation was akin to horse trading in which new benefits can be gained or existing benefits lost but that in first contract negotiation, and there is a greater uncertainty because of the lack of bargaining experience between the parties on which to base a prediction. The Board reversed the administrative law judge who found the employer's comments susceptible to the interpretation that the employer intended to strip away present benefits before bargaining started.

In *Lear-Siegler Management Service*, 306 NLRB 393 (1992), the Board stated as follows:

> The standard for determining whether statements of this type violate Section 8(a)(1) of the Act is set out in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 810 F.2d 638 (9th Cir. 1982), as follows:
>
> > It is well established that ''bargaining from ground zero'' or ''bargaining from scratch'' statements by employer representatives violate Section 8(a)(1) of the act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations [citations omitted].

The Board found that the text of the employer's ''start from zero'' speech and witnesses' description of it clearly set forth a threat of loss of all existing benefits prior to bargaining and unlawful as such in the absence of other statements regarding ''the normal give and take '' of collective bargaining.

Integral to the General Counsel's analysis of the futility-of-bargaining threat issue is the allegation that the videotape also threatened a loss of benefits. The General Counsel notes that in the videotape, Teeley had promised that Sun intended to implement ''striking differences'' from the ''intolerable'' conditions existing under Mediplex. He then points out that thereafter, the narrator referred to the bargaining from scratch statement and the 6 months a year time often needed for bargaining and stated: ''in the meantime, new wages and benefit policies cannot be put into effect.'' The General Counsel argues that those statements in the context of the videotape were intended to signal to employees that the ''striking changes,'' whatever they are, would not be implemented in the immediate future because bargaining starts from scratch. This, he argues, constitutes a threat of a loss of intended future, unspecified, improved benefits.

Unlike the precedent relied upon by the General Counsel, it is not argued that Respondent threatened to take away existing benefits and only restore those benefits after a lengthy struggle in bargaining. That was neither stated nor implied in the videotape. The videotape points out that collective-bargaining agreements are not automatically effected upon union certification but must be bargained for, which ''in most cases'' is bargained ''from scratch.'' In those cases, it points out, 6 months to a year was needed to reach agreement. The videotape does not threaten that the Respondent will demand the stripping away of all present benefits and thereafter bargain from scratch, nor does it prognosticate that negotiations with the Union will necessarily follow such course or that it will necessarily be of such length. The videotape merely points out some of the hazards and problems in collective bargaining. Furthermore, I do not agree with the General Counsel's interpretation that the videotape conveys the message that even if a contract is reached, the wages therein would necessarily be lower than what they would have been without the Union. The phrase ''the union will never catch up'' was clearly not meant to refer to what would occur at the Milford facility without the Union. Rather, it explicitly referred to the contractual rate of progression of wage increases negotiated by the Union at other health care employers in contrast to the higher rate of progression at Respondent's nonunion Windham Hill facility. The videotape disclaimed a preconceived intent to implement the same Windham Hill benefits at Milford. The comparison of union contrast wages to the nonunion Windham Hill wage levels was meant to do as it clearly stated its intent was, i.e., that the viewer should make a decision that union representation was neither a necessity for, nor a guarantee of better wages and benefits. I find no implication in the videotape that wage levels or benefits would be intentionally kept lower at the Milford facility than they were otherwise intended to be if the Respondent was constrained to negotiate a collective-bargaining agreement.

I also disagree that the videotape can reasonably be interpreted to constitute a threat of a loss of benefits. The message Respondent tried to convey was that its predecessor's mismanagement caused employee disaffection to which the union representation effort addressed itself, but that Respondent was now the new owner with a different managerial philosophy. Respondent conceded that despite its more ''people,'' i.e., employee oriented, attitude, it could not lawfully make promises of benefits during the pending question concerning representation. It did promise that because of this philosophical difference in management, ''striking'' differences in management would occur. This broad statement may or may not mean that Respondent would institute differences consisting of mandatory subjects of bargaining but insofar as it did, the videotape disclosed that Respondent could not make such changes outside of the collective-bargaining process which often takes from 6 months to a year to reach contractual agreement. I find nothing in the videotape which supports the conclusion that its message to employees was that union representation would be futile, that Respondent intended to be adamantly regressive, that a contract negotiation would necessarily be violent or of excessive length, nor that employees would end up with less pay and benefits. Nor did it convey the message that they would lose already planned wage raises or benefit improvements if they chose to be represented by the Union. Accordingly, I find complaint paragraph 8 to be of no merit.

D. *The Discharge of Katherine Gill*

Charlotte Ricci, Gill's sister, was hired by Respondent in mid-November 1992 and worked as a laundry aide. During her active tenure, King was the administrator and MacLeman was her immediate supervisor. Ricci entered upon workers' compensation leave in August 1993 and returned for a short period of light duty from December 1993 to February 1994. Another sister, Bernice Steele, also worked at the facility in February 1992. According to Ricci, on February 2, Ricci gave notice in person to King and MacLeman in King's office that it was necessary for her to take workers' compensation leave again. Ricci testified that King told her that it would be no problem and that a replacement for her would be hired and also that a replacement would be hired for another housekeeper who was to be on medical leave. Furthermore, King allegedly volunteered to Ricci that the replacements would be retained permanently in those positions or other in positions found for them.

Gill testified that she found out about the opening when she visited Ricci and Steele at one of their homes and that Steele telephoned MacLeman and arranged for Gill to see MacLeman for hiring the next day. Accordingly, MacLeman met Steele and Gill in the employee parking lot where Gill testified that upon giving her an application, MacLeman hired her on the spot. She testified that she later attended employee orientation and received an employee policy booklet. Gill denies that she was ever told that she was hired on a temporary basis and she assumed she was a permanent employee. It is clear that she was hired as a full-time 32-hour-per-week employee to perform Ricci's duties.

Another witness for the General Counsel, Leslie MacLeman, did not fully corroborate Ricci and Gill. Though she testified on behalf of the General Counsel with respect to certain crucial areas, MacLeman's testimony does not support the argument that Gill was hired as a permanent employee. On direct examination of MacLeman, the circumstances of Gill's hiring were avoided and thus she did not corroborate Ricci or Gill on that point. MacLeman did

testify in direct examination that Gill was hired to replace Ricci and would work ''until Charlotte [Ricci] returned.'' During examination by the union counsel, however, she testified that early in Prisco's assumption of duties as administrator at the Milford facility, he raised the subject of Gill's openly active support for the Union inasmuch as ''it was understood she was a temporary employee.''

In cross-examination, MacLeman testified twice that she did not discuss with Gill, when hiring her, the nature of her job status, i.e., whether permanent or not. After she was confronted with her affidavit, MacLeman testified that she did in fact tell Gill that she was hired as a temporary employee during a prehiring telephone conversation. Then she retracted it and said that she actually made that statement to Steele, not to Gill. In further cross-examination, MacLeman testified that it was her ''assumption'' that at the time of hiring that Gill was a temporary employee. She testified that when Gill subsequently questioned her about her status, MacLeman ''again'' explained to her that she was a temporary employee. Then she explained:

> I explained what temporary employment was. As far as being told she was temporary, that was to be done in orientation. I have nothing to do with it.

When confronted further with her affidavit testimony that she told Gill upon hiring that she was a temporary employee, she responded that she did not use those ''exact'' words. When asked what her exact words were, she testified ''that she was to fill in for Charlotte Ricci. So it was an understanding that she was a temporary employee.'' MacLeman testified that on two occasions, she offered Gill a permanent job in another function, but with fewer hours; and discussed another permanent opening on the night shift in a different area, all of which Gill had refused despite that Gill understood that she was a temporary employee. With respect to inconsistencies between Gill and MacLeman in any area, I credit MacLeman as the more convincing, less interested, and more reliable witness.

Although MacLeman vacillated in her admissions, I conclude that she did, in effect, inform Gill upon hiring that she was a temporary employee. At the very least, that was MacLeman's understanding which conforms with and validates documentary evidence adduced by Respondent consisting of personnel forms which designated Gill as a temporary employee upon hiring and testimony of clerical personnel who prepared them. Clearly, it is most improbable that King would have told Ricci anything to the contrary, particularly in MacLeman's presence. Having concluded that Gill was hired as a temporary employee as Ricci's replacement does not, however, conclude the issue in Respondent's favor. Questions remain to be resolved. Ricci never returned to her position and remained on workers' compensation leave up to the date of the trial. Why then was Gill terminated shortly after the election and approximately 4 months after her hiring if she was hired as Ricci's replacement to work until Ricci returned? The General Counsel adduced evidence which he argues warrants an inference that Gill was terminated because of Respondent's admitted awareness of her leading advocacy for the Union. Administrator Prisco testified: ''I knew; I mean it was obvious; you could see . . . .'' Prisco admitted that he was strongly opposed to representation of his employees by the Union.

The most crucial General Counsel witness with respect to evidence of animosity and unlawful motivation is MacLeman who was contradicted by Prisco. Respondent argues that MacLeman should be discredited because she was biased against Respondent as a result of the nature of her employment termination. MacLeman was not fired nor was she forced to resign. She quit voluntarily because she perceived that Prisco did not redress her complaint that she was compelled to perform extra work, i.e., the duties of her immediate supervisor, Richard (Rick) Le Claire, because of Le Claire's alleged negligence. Instead, she asserted that Prisco merely asked her to ''get along'' with Le Claire. She denied being angered; rather, she testified she became tired as a result of her doing two jobs. She testified that her decision to quit did not distress her because it turned out to be ''the best career decision'' she ever made. There is no evidence that she has suffered economically or otherwise as a result of her resignation.

I find that the circumstances of MacLeman's resignation are not such as to support an inference that she has retained any lasting hostility toward Respondent as to motivate perjured testimony. She testified that it turned out to her career advantage. Furthermore, her demeanor revealed no animosity toward Respondent. She appeared to be a restrained, indifferent but cooperative witness on direct and in cross-examination. Her evasiveness in cross-examination as to conversations regarding Gill's temporary status suggests some favoritism toward Gill's case, but the fact that she admitted the temporary nature of Gill's position constituted a very damaging blow to much of Gill's own testimony as well as to Ricci's and to the General Counsel's theory. Furthermore, there were other areas where she was inconsistent with Gill as to conversations with respect to promised jobs she offered to Gill and as to conversations concerning the Union. The inconsistencies were not to the advantage of the General Counsel's position.

Based upon the nature of her testimony as noted above, and her overall restrained spontaneity, certitude, and persuasive conviction, I find her to be a credible witness. As I did with respect to Gill's testimony except where noted otherwise, I defer to MacLeman's credibility and accuracy where it conflicts with Prisco, who I find to be a far more interested but comparatively less certain and less convincing witness. The following findings are therefore based upon the foregoing credibility resolutions.

MacLeman had several conversations with Gill wherein Gill spoke in support of union representation. According to Gill but uncorroborated by MacLeman, during one of those conversations, MacLeman responded that it did not matter to Gill because she was a temporary employee. Despite Gill's alleged protest that she should be considered a permanent employee because she was a full-time employee, i.e., 32 hours a week, even at the early stage, i.e., May, MacLeman insisted to Gill that she was merely a temporary employee and that moreover, according to Mediplex policy, as such Gill was not entitled to fringe benefits, including medical insurance.

MacLeman testified, without contradiction and credibly, that Respondent Attorneys Roger Gilson and Susan Corcoran held several group meetings with Respondent's supervisors,

including her, wherein preelection supervisory conduct was instructed and she and other supervisors were instructed to engage employees in ''one on one'' conversations to discuss the Union and to report back to the identity of prounion employees. She did not testify that she was instructed to, nor did in fact interrogate employees who failed to volunteer their loyalties. MacLeman testified again without contradiction, and therefore credibly, that she periodically reported back to these attorneys the identity of prounion employees, including Gill, whom she identified as a staunch prounion employee whom she was unable ''to turn against the Union.''

The first conversation MacLeman had with Prisco regarding Gill's union activities occurred as they and other managers looked out of the windows to observe the demonstration during the second march upon the facility. Prisco said that he was upset with Gill and Steele who also marched and wore prounion buttons. Prisco said he would not retaliate against Steele but he said with, respect to Gill, that ''she has some nerve'' being involved with the Union after only a short period of employment and not being in a position to ''know'' management. Someone present informed Prisco that Gill had also participated in the first demonstration.

During an earlier conversation with MacLeman and Le Claire where they discussed the openly declared union supporters, Prisco told them he had told Steele to consider applying for two forthcoming supervisory openings. During the second union administration, Prisco said he had thought that he had won Steele's vote by offering her a supervisor's job, but now she could forget it.

MacLeman had four or five other conversations with Prisco wherein her union activity was discussed. Sometimes they were alone and sometimes Le Claire was present. In one conversation possibly during the second of a union demonstration, after referring to Steele's forfeiture of a supervisory job, Prisco alluded to Gill, saying that as far as she was concerned, if Respondent lost the election, she would be terminated. During other preelection discussions concerning Gill which was prompted by observation that Gill was a temporary employee, Prisco told MacLeman that Gill would be ''history'' and would be terminated if the Union won the election.

MacLeman testified that she offered the other permanent jobs to Gill before Prisco told MacLeman of his conditional intent to discharge Gill. Prisco testified that it was after the second union march, with his knowledge and approval, and he referenced it to specific events. Gill admitted that she was offered one permanent job, and it came at the end of June or beginning of July after both union marches. However, she claims she turned it down because it entailed only 24 hours which did not make her eligible for benefits. Because of Gill's admissions, I credit Prisco as to the sequence of job offers.

At an unspecified date after the June union demonstration, most probably after June 24, Teeley and Prisco conducted a meeting of employees. Gill's account of the meeting is uncontradicted as Teeley did not testify, and Prisco merely could not recall the incident. At the meeting, Gill stated that contrary to her understanding, she had recently been informed that she was a temporary employee. She asked Teeley what that meant. Teeley had only recently assumed authority over the Milford facility after the June 24 acquisition and was making his managerial debut there. Prisco testified it was a week after the acquisition. Teeley responded to her that as far as he knew, it meant that temporary employment was limited to a 90-day period after which, if the employee was retained, benefits eligibility and permanent status was achieved. Gill stated that she accepted her job on the assumption that she would receive the fringe benefits and not for the pay alone. Teeley promised that he would have Prisco check it out. It is not clear exactly just what Prisco was to have checked out.

At this point, the old Mediplex employee policy booklet given to Gill during orientation became relevant. Gill signed a receipt acknowledging that she read the booklet. She testified, however, that she did not read it. On page 4 of that booklet in bold print is the heading ''**Employment status**.'' Under the heading are set forth six types of employment status, i.e., full-time, part-time, regular, temporary, per diem (i.e., as needed), exempt status, and nonexempt status. The last two refer to overtime entitlement and are not relevant. Full-time regular sets forth an employment status of at least 32 hours per week on an ongoing basis with benefits eligibility after the ''introductory period.'' Part-time regular status provides for less than 32 weekly hours with pro rata benefit entitlement after the introductory period for employees who work at 24 hours per week. Temporary status is as follows: ''Employment is expected to continue for 120 days or less. Temporary employees are not eligible for benefits.'' Page 4 describes the introductory period as 90 days. If Gill's recollection is accurate, Teeley may have been confusing her question as to what constituted the introductory or probation period.

According to MacLeman, whom I credit, she discussed with Gill twice the definition of temporary employment, i.e., whether it constituted a period of 90 or 120 days maximum. MacLeman placed these conversations in May or June. The first occasion, she testified, was the occasion of the offer of a personal patient laundry job of only 28 hours. According to Gill, this must have been after the second union march. In these discussions, MacLeman reiterated to Gill her temporary, nonbenefit eligibility status. On one of those occasions, Gill herself had shown the employee booklet to MacLeman and pointed out the 120-day period for temporary employment. Gill did not explain to MacLeman her motivation in those conversations for inquiring about benefit eligibility, i.e., health insurance, accrued sick leave, and holiday pay. MacLeman had no recollection of any prior temporary employee who had actually worked more than 120 days. But neither was she informed of any Mediplex policy regarding a mandatory termination of a temporary employee at 120 days even if the incumbent employee's leave extended beyond that period. She testified without contradiction that up to the time of her resignation on September 8, 1994, no one employee filled in for Ricci and that those hours ''were not filled in any other way.''

Gill testified without contradiction that she encountered and confronted Prisco several times thereafter regarding the status of her benefits eligibility. Each time, Prisco admittedly put her off by claiming that he was still checking. Prisco admitted that of two such confrontations, one occurred on about July 15 and one on July 26. Despite his claim that he considered her a temporary employee and thus manifestly not eligible for any benefits, in cross-examination, he tried to ex-

plain why he simply did not tell her that when she asked him then, as indeed he could have easily told her during the earlier meeting with Teeley when he had been asked to check into it. On July 15, he claimed he was too busy to respond to her in a hallway confrontation because of an ongoing state inspection. On July 26, Prisco testified that Gill explained that her husband was in the hospital and she said that she needed to know if she was eligible for medical benefits.[2] This time, according to Prisco, he did not want to tell her she held a temporary status and was ineligible for benefits because of the presence of other employees and he was ''not ready'' to discuss it with her despite the fact that he already had determined to end her employment almost immediately after the election, an elapse of somewhat more but approximately close to the 120-day temporary status. He explained that he assumed that her husband had maintained his own medical coverage because Gill had asked about her coverage. Thus he disregarded the obvious implication of urgency in her question. When asked why he had not simply summoned her to his office at some earlier occasion to inform her that she was a temporary employee of limited 120-day tenure and not eligible for benefits, he lamely and in sheepish demeanor answered that he ''probably'' was too busy. These disingenuous, strained nonexplanations verge upon the absurd. If nothing else, this phase of Prisco's testimony alone reveals him to be a witness of little credible worth. The inherent improbability of his testimony was further degraded by a total lack of candid spontaneity and conviction. The witness literally flushed in abashment when asked why, in terms of basic human sensitivity, he did not notify Gill of her status in advance of her actual date of termination on August 3; he grandly proclaimed that his managerial technique was to never give an intended dischargee advance notice of termination. Presumably, his perception is that employees who are notified in advance of termination will be oblivious to the possibilities of future job references and will burn their bridges by inadequate work performance thereafter. Just how much inadequacy Gill might have evidenced in less than 3 days is not explained. Prisco claims that had he told Gill that she was ineligible for benefits that she might become ''suspicious'' of her impending doom.[3] This testimony, I find to constitute an unintended admission that Prisco was well aware that Gill was working with the understanding that either she was a permanent employee or at least temporary employee of indefinite tenure with reasonably probable prospects for permanent status.

Prisco's ''explanation'' raises much perplexity if credence is given to his testimony that Gill had been hired as a temporary employee with a fixed tenure of 120 days. If that had been the situation, he simply had to remind her of her status. Yet he dilly dallied and evaded her up to the time of the very election itself and testified in terms of ''notifying'' Gill, not ''reminding'' her, of her status. Regardless of MacLeman's statements to Gill, the latter clearly refused to accept the fact that she was not a permanent employee eligible for benefits based upon her full-time status. This is evidenced by her pressing the issue with Teeley and Prisco.

Thus Prisco gave no convincing explanation as to why Gill's misconception, if that's what it is, was not corrected much earlier. Pragmatic managerial deception falls far short of a satisfactory response.

MacLeman testified that after the meeting with employees at which Gill raised the questions of her benefits eligibility, MacLeman privately met with Prisco and asked him about Gill's benefits eligibility. Prisco responded by telling her to ''let it sit for a whole.'' The inference to be drawn from this response was not that Prisco was checking anything out but rather that Gill's benefit eligibility, i.e., her future employment status, was as yet unsettled. Arguably, the settling factor would be the election result.

MacLeman prepared advance laundry department work schedules for the 6 workweeks from July 25 through September 3. Included in those arrangements was Gill. These schedules are routinely prepared 1 month in advance. Clearly, MacLeman did not anticipate an abrupt termination of Gill's employment status at 120 days, regardless of its temporary nature. MacLeman considered Gill to be a good worker and reported this evaluation to Prisco. Clearly, he accepted it because if he is to be believed, he had concurred in the offers of permanent jobs to Gill.

Gill testified that she was not scheduled to work on July 27, however, she appeared at the Milford facility to help distribute to employees the ''vote yes'' petition signed by 89 employees. Gill testified that her next scheduled workday was August 3. The general work schedule assigned her to shifts on July 26, 27, 30, 31, and next on August 3. The discrepancy is not explained. On July 28, she voted but was challenged by Respondent as a temporary employee. On August 3, Gill telephoned the facility to notify it that she could not report to work because of an ear infection. MacLeman telephoned her, pursuant to instructions from Prisco, to tell Gill that she was terminated because her 120-day tenure as a temporary employee ''was up.'' Prisco told MacLeman that they needed ''to take care of the issue.''

Prisco testified that his personal policy as an administrator at other facilities, prior to assuming duties at Milford, was not to hire temporary employees.

Priscilla Van Heinengen, Respondent's director of human resources eastern division under both Sun and Mediplex, visited the Milford facility during this period for 2 or 3 days a week. On a date which Prisco fixed as mid-July, but which Van Heinengen does not specify, she visited the facility and had business in the payroll office of Linda Drayer relating to Drayer's orientation regarding implementation of Sun benefits. She testified that Prisco entered and, in the presence of Le Claire and MacLeman, asked her whether the 120-day temporary employee status was enforced under Mediplex. She testified that she answered that it had been routinely enforced at all facilities if there was ''no other assignment for the employee to go to.'' She further testified that she is not normally involved in those decisions and it is within the dis-

[2] Prisco did not contradict Gill's testimony that on July 26, as Gill was about to leave at the end of her shift, it was Prisco himself who intercepted her to remind her that he was checking the question of her benefits eligibility.

[3] Prisco did not modify or correct a form memorandum Gill received, as did other unit employees, wherein she was notified on July 7 of a 75-cent raise and another raise of ''up to 5 percent increase on your anniversary date.'' The above-described deception or simple inadvertence might account for the failure to delete that printed language. Yet the memorandum was personalized by a handwritten notation addressed to ''Kathy'' referencing a bonus rate for weekend work. That notation suggests personal attention to the memorandum and counters the suggestion of inadvertence.

cretion of the local administrator to decide whether to retain a temporary employee ''or to conclude [the employment] at the end of the assignment.'' She testified that it was within the policy and permissible practice of Mediplex to retain a temporary employee for at least another 30 days if the incumbent, which was replaced, had not yet returned to duty and that sometimes the temporary employee was put into any available open permanent position. Van Heinengen testified that if there is no permanent position open ''and no need to retain them on a temporary status, they'd be let go.''

In cross-examination, Van Heinengen testified that she told Prisco it was within his discretion to continue to retain Gill as a temporary employee and to extend the 120-day period if he wanted to do so. She again conceded that the extension of the 120-day period is discretionary, particularly if the incumbent has not returned and if the workload requires it. She had no recollection that Prisco talked about the workload, nor whether Prisco had mentioned when Ricci's return was expected, nor whether or not he referred to her union activity. Prisco testified that he had a conversation with Van Heinengen about Gill in mid-July because Gill was approaching 120 days of employment and he needed to decide whether to offer Gill permanent employment. He testified that he also discussed with Van Heinengen in the presence of Le Claire and MacLeman, that because a decline in patient census at that time from 120 to 90 beds and the creation of a personal laundry aide took up ''a lot of slack,'' there was a lack of need for temporary employees in the laundry and he had decided to terminate Gill. He placed this meeting on July 21, the Friday before the election. Le Claire did not testify. MacLeman was not called upon to corroborate Prisco, and nowhere in her testimony is there any reference to workload in communications she had with Prisco regarding Gill's status. As noted, Van Heinengen was unable to corroborate Prisco regarding workload in reference to Gill's retention. Moreover, she testified to only one Gill oriented discussion with Prisco.

At that point in Prisco's testimony, his already none-too-convincing demeanor and lack of forceful narration plunged to an even lower level. In a descendingly quiet tone of voice, marked by palpable nervousness, hesitancy, and lacking assurance or any semblance of self-confidence, he then shifted the emphasis as to who made the discharge decision. Now Prisco testified that at the July 21 meeting, Gill's discharge was jointly made by himself, Van Heinengen, Le Claire, and MacLeman; i.e., ''we basically determined that her services weren't going to be needed any longer, and it was basically figuring out which would be the best date by which to terminate her employment.'' He testified it was he who raised the issue of the release date to which Le Claire and MacLeman ''didn't have a problem on what day it occurred.'' He subsequently executed the ''pink slip'' form for Gill's termination. Normally, that was not his responsibility but he did so because he considered Gill's discharge to be a ''hot potato,'' i.e., the discharge of a union activist immediately after the election. Prisco explained that he did not want to discharge Gill before the election because he still had 120 days in which to act and he didn't want to terminate her employment on election day. He explained that he was afraid of being accused of an unfair labor practice, but he was unable to explain why he thought he would have been less vulnerable to such charge after the election. Prisco instructed MacLeman to notify Gill of her discharge by telephone after the election because he was aware she was on sick leave for an unknown length of time and saw no reason to wait for her return. Gill was absent with an ear infection and not a prolonged disability.[4]

Van Heinengen does not corroborate Prisco as to the substance of the July 21 meeting, nor that there ever was such a meeting, nor that he ever discussed workloads or the termination discussion with her. I have already noted MacLeman's credited testimony with respect to Prisco's periodically expressed intentions to terminate Gill if the vote was favorable to the Union, which Prisco denied in the same sheepish demeanor. According to her credited testimony, she did not participate in any such joint discussion as Prisco described as having occurred on July 21. She rather was informed by Prisco of his decision to discharge Gill. When she telephoned Gill, she was silent as to workload and gave Gill the sole reason for her discharge as the elapse of 120 days of temporary employment.

When asked about other layoffs after the election, Prisco flustered and said he could recall none unless he checked her records. Then he testified that four or five employees were fired or laid off. He could name only three persons, however, i.e., Gill, Melissa MacLeod, who was discharged for cause, and Chris, the respiration therapist who was laid off and transferred to another respondent facility because of ''downsizing'' in the respiratory therapy department.

Respondent's argument, that it was partially motivated by a downturn in a patient census, clashes with its preelection propaganda. In the videotape, Teeley glowingly described Respondent as a growing enterprise wherein downsizing was not to occur. Prisco himself described how employment had been augmented. The evidence fails to reveal any other significant downsizing because of depressed patient census.

Respondent adduced evidence as to the nontermination of other known employee union activists, particularly Steele who ultimately became a supervisor. As we have seen, however, Prisco had been particularly outraged because Gill, a relatively new employee in some kind of temporary status, either short- or long-term, had the audacity to join in the forefront of the union assault. Contrarily, Gill had been offered permanent jobs of fewer hours, jobs unacceptable to her desired shift times or jobs involving unacceptable job functions by MacLeman without veto by Prisco. Prisco's prior awareness of those offers via Le Claire rests, however, upon Prisco's own testimony and his own credibility which I find profoundly lacking.

A review of Respondent's bed census figures from April 1, 1994, through September 30, 1994, shows that it had reached the 110 or more status from April 1 to June 13 and thereafter remained only a little over 100 to June 21. Thereafter, the figure dropped rapidly to the low or mid-90s until July 1 where it remained at or near 100 until July 8. Thereafter, the census varied from the mid to low 90s. On July 26, it had risen to 99 and proceeded upward to 102 on July 28. In August, the census varied up and down from mid-90s

[4] This is strikingly inconsistent with Respondent's conduct toward challenged voter Linda Wilson, whom Respondent delayed discharging for patient abuse until Wilson returned from medical leave of excessive duration. See discussion below.

to 101. September saw a gradual rise from generally high 90s to well over 100 for the last 10 days.

At no time was Gill ever warned that the laundry workload had decreased to the point that her status was ever in jeopardy. MacLeman made no reference to it when she offered Gill two permanent jobs and discussed another permanent opening with her. Surely MacLeman would have warned Gill about such jeopardy on those occasions if it were a real threat. In fact, there is no credible evidence that Prisco ever discussed the decreased laundry workload in relation to Gill, with MacLeman or anyone else. MacLeman did not tell Gill that it had any connection to her termination. Prisco's generally disingenuous testimony suggests that patient census was merely a thrown-in subsequent explanation to bolster the defense to an expected unfair labor practice charge.

I conclude that Gill was hired technically as a temporary substitute for Ricci for an extended indefinite period of time. I conclude that there is no credible basis to find that the condition for her status change had ever occurred, i.e., the return of Ricci or the drastic reduction in her workload. I find that it was Respondent's, i.e., MacLeman's and Le Claire's intention to offer Gill any permanent positions opening that might occur during this extended indefinite temporary employment, most probably unknown to Prisco. I find that there was no immediate economic or policy threat to the end of Gill's employment known or expressed by Le Claire or MacLeman at the time of those job offers unrelated to Gill's union activity.

Based upon the foregoing findings and conclusions, I further find that the General Counsel has adduced sufficient evidence to support a strong inference that the termination of Gill after the election was motivated in part, if not in whole, because of her leading advocacy of the Union, which Prisco viewed as the impudence of a newly hired employee which particularly galled him. Thus the General Counsel has satisfied this burden of proof imposed by *Wright Line*, 251 NLRB 1083 (1980). I further find that the Respondent has failed to meet the shifting burden under that decision to demonstrate that Gill would have been terminated on August 3, 1994, even in the absence of her union activity. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) as alleged in the complaint.

IV. THE REPRESENTATION CASE ISSUES, CASE 34–RC–1258

A. *The Objections*

The August 4, 1994 objections to conduct affecting the results of the election filed by Respondent consisted of nine specific objections. Four of those objections, 5, 6, 7, and 9, were withdrawn by the Respondent with the approval of the Regional Director. No evidence was submitted by Respondent in support of Objection 8. The first objection alleges that moments before the polls opened, Union Vice President David Pickus physically assaulted Respondent's counsel, Roger P. Gilson Jr., i.e., shoved him up against the wall of a corridor leading to the voting room, in view of ''many eligible voters.'' The second objection alleges ''electioneering'' near the polling area and directed communications to assembled voters in violation of *Peerless Plywood*, Inc., 107 NLRB 427 (1953). This second objection actually has its genesis in the same preelection episode as Objection 1 and allegedly preceded the assault, i.e., the shouted words of Union Agent Ferrara regarding a ''victory party'' to employees in the lobby or corridor leading to the voting room. Gilson's admonishment to Ferrara and her retort to him precipitated the alleged assault by Pickus who then intervened.

Objection 3 alleges the failure of the Board agent to properly instruct voters as to how to cast ballots which resulted in three challenged ballots with extraneous markings. The fourth objection alleges that the Board agent improperly utilized a ''tethered pencil with a worn out erasure'' which, in turn, ''gave voters the impression they could correct a 'spoiled ballot' by erasure, but did not give them the effective means for doing so.'' The objection alleges this failure as the cause of a challenge to a ballot having a ''smudged erasure in the yes box and large and dark 'x' in the no box.''

1. The preelection confrontations

The voting on July 28 for the day-shift unit employees commenced at 6 a.m. The representatives of the parties and their observers arrived earlier to inspect the voting area, i.e., the dining room, and to consult with the Board agent. Access to the dining room was reached by a corridor which connected it to the front lobby of the facility at which is located a small reception desk. The Board agent and employer representatives, including Teeley and Attorney Gilson, arrived first. The latter arrived at 5 a.m. By about 5:45 a.m., the union party had all arrived and congregated outside the facility. Some had arrived earlier than others and awaited Union Vice President Pickus. The union party consisted of Pickus, organizer Ferrara, and several unit employees. Among the employees in the union group were Ellen Musante, the central supply coordinator (a unit employee) and day voting session observer; Judith Saja, a dietary aide, union activist, and afternoon voting session observer; Tawana Dixon, a nurses aide and employee union activist; Pamela Cobb, a dietary aide and member of the union organizing committee; Ellen De Nicolo, a dietary aide; and a kitchen employee identified as ''Jim.''

The union group was greeted by Teeley and Gilson who informed them that they must enter at the side door rather than front door through which the general pubic enters and through which the Respondent's observers had entered. Pickus took umbrage at what he considered to be churlish and provocative conduct and goading demeanor of Gilson who insisted upon what Pickus considered to be ''second class'' mode of entry. Words were briefly exchanged. An attempt was made by Teeley to summon the Board agent, but inasmuch as the election was minutes away, Pickus circumvented Gilson and led his group through the front door and into the lobby.

As to the alleged assault and related conduct, the testimony of union witness Pickus, Cobb, Dixon, and Saja contradict the testimony of Respondent witness Gilson, Musante, Prisco, who had only limited observation of the corridor from the dining room area, and Terry Johnansen, an assistant occupational therapist and unit employee, who, all union employees' witnesses swear, was not observably present in the area. Ferrara did not testify. According to Pickus, she had left the country prior to the trial. There is no indication that she had either been subpoenaed or requested to delay her departure nor that there had been any effort to try to obtain her deposition. Not only do each party's witnesses contradict the

other's witnesses, they are mutually inconsistent. Particularly inconsistent are the union witnesses as to their own location and related positions of other members of the union entourage as it was led across the lobby and into the corridor shortly before 6 a.m. on July 28. Union witnesses deny the presence of any other persons or employees, i.e., eligible voters in the lobby, as they proceeded. Gilson's testimony that other employees were present was conclusionary, speculative, and based on assumption that persons he claimed were there, were employees. Despite the fact that Johnansen testified shortly thereafter, Gilson was not called upon to retroactively identify him by sight as one of those persons.

Gilson testified that he followed the union group into the lobby, having sent Teeley ahead to alert the Board agent. He testified that Ferrara was 10 feet ahead and to his left at a point in the lobby where they were about to enter the 40-foot-long corridor leading to the dining room, when at that moment Ferrara waved to unidentified persons he assumed were employees and, in a voice loud enough to be heard across the relatively small lobby, said words ''to the effect'' of ''Hey, Hey, we'll see you at the victory party tonight.''

Johnansen testified that he heard Ferrara ''jubilantly yell'' across the lobby to someone: ''We'll see you at the celebration party later'' when the episode unfolded as the group had just passed him in the lobby at the reception desk to the immediate side of the entrance. Then he testified that the group was ''just entering'' the corridor 10 to 15 feet from his position in the lobby. He further testified that he was closer to Ferrara who was to his right whereas Gilson was to his left. He placed Gilson 5 to 6 feet from Ferrara. Accordingly, since they had just passed him in the lobby, that would have placed Ferrara to Gilson's right, not to his left as Gilson testified. In cross-examination, he shifted his position from being in the lobby initially to a point in the corridor where he now claimed that he remained until the incident occurred at a point immediately after the group had walked past him at a very close, observable location.

Inconsistent with Gilson was Musante, the union observer who testified on behalf of Respondent. According to her, Ferrara made the invitation to a victory party not to any employee but rather to Gilson himself. She placed herself at the lead with one or two other employee group members, ahead of the group as it was entering the corridor and ahead of Gilson and Ferrara who were still in the lobby. She first testified that there were no employees at all in the corridor. Then upon a leading question by Respondent counsel, she agreed that she did not ''recall'' seeing any employee there. I credit her first answer as more candid and more accurate. She was unable to corroborate Gilson that there were any unit employees in the lobby. Neither could Johnansen, except that he thought perhaps there was one maintenance employee further into the corridor. Cobb, Dixon, and Saja insist that there were no other persons in the lobby or in the hall. None of them heard the victory party comment.

Prisco was at the main dining room door 40 feet away and heard very little, but he could not identify any employees in the corridor except Dixon and Musante. He placed Ferrara as a little ahead of Gilson to his right, about 5 to 6 feet away from him.

Gilson testified that when he heard the victory party remark, he turned to Ferrara and, with uplifted finger, he admonished her that there would be no campaigning to which she responded with a shout. The union employee witnesses described him as wagging his finger literally in her face as they stood in close proximity when they looked in response to Ferrara's shout. Gilson, Johnansen, and Musante testified that Ferrara shouted, ''F— you,'' which caused Gilson to admonish her as to her language. Pickus, Saja, Cobb, and Dixon testified that Ferrara shouted: ''Get your f——g finger out of my face.''

Immediately, Pickus intervened, probably from a point between Musante and others at the lead and Ferrara and Gilson behind him, and still others behind Ferrara and Gilson. According to the union witness, Pickus, hands stiffly at his side, inserted himself between Gilson and Ferrara who were inches apart, at which point, without coming in touch at all with Gilson, told him not to mistreat his people. According to them, Gilson taunted Pickus with such comments as ''Go head, hit me, hit me'' (Saja); ''Are you going to hit me?'' (Cobb); ''You want to assault me; go ahead hit me'' (Dixon); and ''what do you want to do hit me. You want to hit me?'' (Pickus). According to them, Pickus quickly extracted himself with softly spoken words declining the invitation from this admittedly momentary confrontation, and the party moved toward the voting area. The incident caused no election delays.

Prisco described Gilson's conduct and demeanor that entire morning as one of constant goading and grinning provocation all throughout the outside incident up to and through the confrontation. Dixon, however, insisted that Gilson was unsmiling, grim, red-faced, and enraged.

Respondent witnesses portrayed Pickus' reaction drastically different. According to them, Pickus intervened by rushing between the two people and, with arms outstretched, shoved Gilson momentarily against the side wall. According to Gilson, he very coolly told Pickus ''go ahead assault me and I'll file objections'' at the moment he was supposedly ''jockeying'' himself and bracing his position to prevent falling. He characterized Pickus as flushed and enraged but that Pickus immediately stepped back. They glared at each other for a few moments and walked on. Neither Prisco nor Musante heard what Gilson and Pickus said to each other despite Musante's estimate that she was only 5 feet away. Musante appeared to take the whole incident in within a momentary glance as she quickly continued walking on. She explained that she was embarrassed by the unprofessional behavior, although she admitted not hearing the words that may have provoked it.

Johnansen testified that Pickus shoved Gilson against the wall while telling him, ''don't be pointing [your] finger in my people's face.'' It is unlikely that Pickus would have reacted so heatedly and made such spontaneous accusations if Gilson's description of his restrained admonishment of Ferrara and gentle finger movement is to be believed. Clearly, the union witnesses' description of the aggressive finger pointing proximity is more credible and provided the catalyst to Pickus' sudden intervention. It further explains the enragement Gilson perceived in Pickus' demeanor.

Credibility resolution is hampered by the general bias of all witnesses as well as a wealth of mutual and external inconsistencies, only some of which are noted above. All union witnesses were staunch union activists. Johnansen's emotional bias against the Union was revealed not only by his palpable physical demeanor and tone of voice but by his own

admissions, particularly as to his perceived insensitivity of the Union in relation to his sister's death during the campaign. Musante followed the lead of Respondent counsel's questions. She tended to downplay the aggression in the face finger wagging of Gilson as ''might have pointed a little'' but not close to the face. She first testified that she saw the pushing. Then she testified that ''I think he pushed him, yes'' because he was already against the wall when she turned. In cross-examination, she testified that it looked like he had been pushed, i.e., Pickus' arms were outstretched against Gilson, holding him back. On direct examination, she was a very quiet, reticent witness. In cross-examination, she was unusually tense and rigid. She invariably referred to Gilson during her testimony by his first name. Musante, by her overall demeanor, was a witness who was favorably disposed to Respondent. Pickus and Gilson are manifestly interested in the outcome of the proceeding. Gilson affected a diffident and, at most times, unemotional demeanor. Pickus was grim, tense, and could not help but glare at all Respondent's representatives and most particularly Gilson.

Credibility resolution of these inconsistent and biased witnesses is no easy task. I am convinced that witnesses of both sides exaggerated or mitigated what did happen to the benefit of their respective sides. The objecting party has the burden of proof. Because of the inconsistencies in the testimony of Gilson, Johnansen, and Musante, I cannot find sufficient convincing, credible evidence that Ferrara engaged in any campaigning during this episode. I believe the very positive and assured testimony of Cobb, Dixon, and Saja that there were no other observable eligible voters in the lobby or in the corridor to whom she addressed a victory party remark. I am convinced it would not have been to Johnansen who had already become outspokenly anti-union long before the election, if indeed Johnansen was present at all lurking in some unobservable position. Johnansen did not identify himself or anyone else as the recipient of the invitation. I conclude that Johnansen probably was present because he would not have otherwise testified to the finger-in-the-face accusation of Pickus which was absent from Musante's testimony and inconsistent with Gilson's account, i.e., ''no one talks to my people that way.'' I believe that Pickus, having become agitated by the entrance episode and believing Gilson to be provocative, did become enraged by Gilson's finger-in-the-face conduct toward Ferrara. I conclude that he did insert himself between Gilson and Ferrara who were so close together that some bodily contact must have been made by Pickus. I find that it is most improbable that he would, under these circumstances, have waddled gently between them in an arms stiffly downward, penguin-like movement. I find that Pickus did somehow physically touch and maneuver Gilson against the wall with arms extended. I believe that Gilson exaggerated the force and vigor of that maneuver. I credit Musante and Johnansen that it was described by them to a few other eligible voters shortly thereafter as a push and shove incident. I conclude that the incident was fleeting and momentary in duration and that nothing about it could be construed as a threat to the safety or well-being of either Gilson, his client, his client's property, or to any eligible voter. Gilson did not bother to file a police report nor to take another course of legal action. It constituted an embarrassment for the Union as Musante considered it. It was at best an overreaction to the perceived incivility of Respondent's counsel to Ferrara who, in turn, in part prompted it by her own vulgarity. Such conduct falls far short of that evaluated by the Board in cases involving direct threats to employees of physical assault and even death. *Picma Industries*, 296 NLRB 498 (1989); *Westward Horizons Hotel*, 270 NLRB 802 (1984); *Bristol Textile Co*., 277 NLRB 1637 (1986); *Baja's Place, Inc*., 268 NLRB 868 (1984); *Smithers Tire*, 308 NLRB 72 (1992); *Sheraton Inn Airport*, 596 F.2d 1280 (5th Cir. 1979); and *John M. Horn Lumber Co. v. NLRB*, 859 F.2d 1242 (6th Cir. 1982).

Precedent involving union agent misconduct toward the employer's agent cited by Respondent are distinguishable. In *Kennicut Bros. Co*., 284 NLRB 1125 (1987), union agents engaged in aggravated threats and a brutal assault upon the employer's president in front of 15 employees.

In *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), which involved a small unit of 10 employees, 2 union agents ''repeatedly and belligerently'' refused to cease an ''unwarranted trespass'' into the employer's shop area even after police officers were summoned. The Board found therein as the vitiating aspect the message which was sent to employees by such conduct, i.e., that the employer was ''powerless to protect its own legal rights in a confrontation with the Union.''

The *Phillips Chrysler Plymouth* case was later distinguished by the Board with respect to facts before it in *Station Operators*, 307 NLRB 263 (1992), which failed to establish that union agents' three separate verbal confrontations 2 weeks before the election constituted a direct challenge to the employer's property rights in a manner that would tend to interfere with employees ''free choice in the election'' under the standards it had set forth in *Baja's Place*, supra.

In the *Baja* case, the Board sustained an objection to the election wherein a union agent, 3 days before the election, sent an obscene letter to an employee who he perceived was the cause of the discharge of an employee organizer. The union agent, however, also had threatened to ''get'' that employee and to ''get'' his job. The Board observed that the employee was a professional bartender and the union agent had influence with respect to a significant number of employees in the industry. The Board stated:

> In addition, the hearing officer erred in applying the third-party standard of whether the conduct created a general atmosphere of fear and confusion. *Because the threats in issue were made by an official of the Petitioner*, rather than by a rank-and-file employee, the proper test is whether the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election.

The Board thereafter again distinguished the *Phillips Chrysler-Plymouth* case in *Edward J. De Bartolo Corp*., 313 NLRB 382 (1993). In that case, the union agent entered onto the employer's premises on election day to talk to employees in an area open to the public and refused the employer's request to cease talking. He was not asked to leave nor were the police summoned. The Board held that there was no ''suggestion, as there was in *Phillips*, that the Employer was powerless to protect his property rights, because the Employer never asserted its property rights in the first place. There never was any battle, on this particular front, for the Employer to lose.''

I find nothing in Pickus' conduct on July 28 to constitute any threat to Respondent's property rights. Nor do I find that it constituted conduct that would reasonably tend to interfere with the employees' free and uncoerced choice in the election. The incident at most would tend to embarrass employees who might tend to vote for the Union, but it could not reasonably tend to coerce any employees into voting for it.

With respect to Objection 2, I have found as a matter of fact that Ferrara did not campaign nor improperly communicate with employees at the polling site. Even if Respondent's witnesses are credited and she did make the victory party remark, it did not constitute a speech to massed assembly of employees within 24 hours of the election as proscribed by *Peerless Plywood Co*., 107 NLRB 427 (1953), as cited by Respondent. Nor would I consider it to be the type of sustained conversation with waiting prospective voters prohibited by *Mitchem, Inc*., 170 NLRB 362 (1968). If it had occurred, it would have fallen within the de minimis exception therein. See also *Dayton Hudson Department Store v. NLRB*, 987 F.2d 359 (6th Cir. 1993).

In view of the foregoing conclusions, I find that Objections 1 and 2 are without merit.

2. Board agent misconduct

Objection 3 alleges that the Board agent ''failed to provide voters with instructions on how to properly cast ballots,'' which ''resulted in three challenged ballots with extraneous markings.'' Two ballots contained the ''F'' word obscenity along with entries which the Union now concedes in its brief constitutes a clear intent to vote no, and thus the Union withdraws its challenges to them. One ballot also challenged by the Union had markings in both boxes. Respondent argues that the yes box appears to constitute an erasure while the no box has a bolder marking.

The Respondent's sole evidence that the Board agent failed to give adequate voting instructions rests upon the testimony of Musante. The totality of her testimony is that she did not hear the agent say anything about spoiled ballots. Such evidence is totally inadequate. It is uncorroborated, cryptic, generalized, and given without certitude and conviction. She did not even explain whether or not the Board agent gave any other instructions or made any statements or whether, if he did, she was listening to what he said. Furthermore, as is now conceded by the Union, the extraneous obscenity did nothing but enhance the obvious intent of the voter. I find no merit to Objection 3.

With respect to Objection 4 regarding the worn out eraser on the pencil provided for voting, Musante could not even recall with certainty that one was provided. She thought there was one but was uncertain whether it had an eraser or not. Although the parties stipulated into evidence the pencil used for the election, it is unknown at what point the eraser was worn down and thus when and if its defect was brought to the Board agent's attention. In any event, the total impact of the allegedly defective pencil appears to be limited to one ballot. It would thus be perverse to rerun an entire election of over 150 voters because 1 voter made a sloppy effort to erase his initial marking, when it is not even known whether that voter may have worn down the eraser. Accordingly, I find Objection 4 to be without merit.

B. *The Challenged Ballots*

The Regional Director's report on challenged ballots and objections describes the service and maintenance unit that the parties stipulated to, and the Regional Director approved:

> All full-time and regular part-time service, maintenance and clerical employees, including certified nurses assistants, occupational therapy aides, ward clerks, dietary aides, cooks, head cooks, housekeeping aides, laundry aides, assistant maintenance supervisor, recreation aides, physical therapy aides, central supply clerk, billing, collections and accounts receivable clerks and medical records clerks employed by the Employer at its 245 Orange Avenue, Milford, Connecticut facility; *but excluding* receptionists, payroll/accounts payable clerks, computer operators, data entry clerks, admissions clerks, licensed practical nurses, registered dietetic technicians, rehabilitation therapy technicians, *therapeutic recreation directors*, certified technicians, physical therapy assistants, registered nurses, physicians, registered physical therapists, dieticians, registered respiratory therapists, certified respiratory therapy technicians, speech pathologists, social workers, administrative assistants, marketing director, manager of case management, head receptionist/secretary, executive chef, managerial employees, confidential employees, *technical employees* and all guards, *professional employees*, and supervisors as defined in the Act [emphasis added].

1. Katherine Gill

The Respondent contended that Gill was only a temporary employee about to be terminated on the day of the election. I have found that Gill would not have been terminated had it not been for her union activity. She could have otherwise continued her employment as long as Ricci remained absent, on an extended indefinite technically ''temporary'' but full-time status which was subject to conversion to permanent status when a permanent position which she found acceptable became open for her. I find that her status on the date of election was, in effect, that of a regular full-time laundry aide and, as such, she was an eligible voter whose ballot should be opened and counted. Moreover, the unit description includes ''full time'' employees without qualification to regularity or permanence of employment.

2. Charlotte Ricci

As noted above, Charlotte Ricci was on extended disability, i.e., workers' compensation leave on July 28, 1994. Ricci has not resigned and has never been notified that she was terminated. Respondent argues that when Gill was terminated, Ricci's position was not filled and thus Ricci had no expectation of recall. Even if Respondent were credited, however, her position was not filled because of a transient depression in patient census. In any event, the decision to not fill Ricci's position, I have found, was part of an unlawfully motivated plan to terminate Gill. Moreover, the Board has recently held that employees on disability or medical leave are presumed to be eligible to vote absent an affirmative showing they have resigned or have been discharged. The Board, for pragmatic reasons, now refuses to apply the reasonable expectation of recall test for laid-off employees to sick or

disabled employees. *Vanalco, Inc*., 315 NLRB 618 (1994). Accordingly, I find the challenge to Ricci's ballot to be without merit.

3. Linda Wilson

According to uncontradicted testimony, Wilson had been accused of patient related misconduct in April 1994. Human Resources Director Van Heinengen and the prior administrator conducted an investigation and, based upon Wilson's admissions, they decided to discharge her. On the day that the discharge decision was made, Wilson was on medical leave for a surgical procedure and was scheduled to return the following Monday. Wilson's return to duty was delayed because of rehabilitation complications. She was not advised of the termination decision until September 1994, at the time she was medically released to return to work. Van Heinengen concluded that it would be improper to notify Wilson of her termination while still on disability leave which she expected to be short-term. She then instructed her subordinate not to notify Wilson until her disability ended. Wilson then communicated with Prisco to advise him of her medical release and he then informed her she was discharged. Accordingly, she never returned to work.

Respondent argues that Wilson's disability absence delayed the formality of a discharge notification and therefore Wilson was no longer an employee with an expectation of returning to work and thus was ineligible to vote, citing *Edward Waters College*, 307 NLRB 1321 (1992). In that decision, the hearing officer found that in the absence of affirmative evidence of resignation or discharge, a presumption of eligibility must be rebutted by evidence of expectation whether the employee in that case continued to hold a nonunit position as of the election date and thus was ineligible to vote. The Board agreed with the hearing officer's criteria application but disagreed with his evaluation of the rebuttal evidence as to other reasonable expectation.

The Union argues that the subsequent *Vanalco* case, supra, is dispositive of Wilson's eligibility, i.e., she was never formally discharged and had never resigned and thus she was an eligible voter.

The Board in *Vanalco* appears to have invoked the eligibility presumption test for sick and disabled employees and to find inapplicable to them the reasonable expectation of return to work test applicable to laid-off employees in order to avoid the expanded litigation ''into states of mind or of future prospects'' inherent in the later test. The evidence in this case establishes an intent to discharge but not an actual discharge of Wilson. Her status in Respondent's records as of the date of the election was not that of a dischargee but rather that of an employee on disability leave. Thus her name was included in the so-called ''*Excelsior*'' list or voter eligibility list prepared by Respondent before the election, and no indication of termination existed in her personnel file until mid-September 1994.

I conclude that Respondent's argument requires a reasonable expectancy of recall test which, according to the plain language of *Vanalco*, is inapplicable. Accordingly, I find that as of July 28, Wilson was not a discharged employee but rather an employee on disability leave who was eligible to vote in the election.

4. Nancy Smith

Smith's ballot was challenged by Respondent at the election. Later, the Respondent attempted to withdraw its challenge to her ballot, but the Union contended that she did not meet the Board's criteria of a regular part-time employee. The Regional Director, who was upheld by the Board on appeal, refused to accept the withdrawal.

On the date of the election, Smith was employed as a per diem certified nursing assistant. In April 1994, she had transferred to that status from that of a regular full-time unit employee. The Union argues that Smith was not eligible to vote because during the 3-1/2-month period preceding the election, i.e., 15 weeks, she worked 31.75 hours or an average of 2 hours per week. The Union cites *Davison-Paxon*, 185 NLRB 21 (1970); *Marquette Hospital*, 218 NLRB 713 (1975); and *S. S. Joachin & Anne Residence*, 314 NLRB 1191, 1193 (1994). The criteria applied by the Board in those cases for eligibility of casual employees, however, is an average of 4 hours or more per week worked during the yearly calendar quarter preceding the *eligibility* date. See also *Beverly Manor Nursing Home*, 310 NLRB 538 (1993).

The eligibility date in this case is June 4, 1994. In the period from January through March, Smith was a full-time employee. From April 1 through pay period ending June 25, i.e., the second calendar quarter, Smith averaged more than 4 weekly hours. There is no evidence upon which to base a projection that Smith would have necessarily worked less than those hours in the future, albeit there was a dip in her hours worked in the period calculated by the Union. Accordingly, I find that she was eligible to vote on July 28, 1994.

5. and 6. Sheila Owen and Jennifer Chase

The ballots of Owen and Chase were challenged by the Union as professional or technical employees holding the title of ''Therapeutic Recreation Directors'' (TRDs). The TRD position is explicitly excluded in the unit description stipulated to by the parties and approved by the Regional Director.

In support of its challenges, the Union relies upon certain documents produced from the Respondent's records. The director of therapeutic recreation is Faye D. Golder. She was Owen and Chase's supervisor and is clearly excluded from the unit by stipulation. An ''Employment Requisition'' form dated March 28, 1994, purports to be filled out and signed by Golder in which Owen's job title is written in as ''TRD.'' Owen's personnel status form reflects an ''EEO Job Code'' as 02, i.e., ''professional.''

With respect to Chase, her employment requisition form dated July 22, 1993, purportedly filled out by the director of human resources, designates her job title as ''Recreation Asst/TRD.'' Chase's personnel status form also reflects an ''EEO Job Code'' as an 02, i.e., ''professional.'' An employee evaluation form dated July 26, 1994, purportedly filled in by Golder, has entered thereon for ''position title'' for Chase as ''TRD.''

The only testimonial evidence proffered with respect to the job status of Owen and Chase was that of Administrator Prisco who was uncontradicted, but whom I find elsewhere to be an unreliable witness. Respondent's position is that Owen and Chase both were therapeutic recreation assistants (TRAs). TRAs are not mentioned in the unit description.

Prisco testified that TRDs are subject to state imposed guidelines inapplicable to TRAs; relating to experience and/or education. Chase, however, had a bachelor of arts degree when hired. According to Prisco, the TRA position requires only a high school diploma. Prisco testified that Owen and Chase were hired as TRAs and employed as such and are paid at a rate of pay less than some bargaining unit positions.

Prisco identified as records kept in the normal course of business by Respondent a new hire form dated July 26 for Chase which set forth her title as ''Therapeutic Recreation assistant,'' and a job description form for Chase which sets forth her title as ''activity assistant/aide.'' Chase resigned her position after the election. When employed, she and Owen reported to the therapeutic recreation director, Golder.

The only evidence as to the actual work situation and duties of Owen and Chase was testified to in very general terms by Prisco. They both use the same facilities as unit employees; they punch a timeclock; unlike Golder, they both use the same dining room and parking lot facilities as do unit employees and are eligible for the same benefits. They both interact with the certified nursing assistants with respect to transporting of employees. They interact with unit dietary aides with respect to special food preparation for patients. They interact with unit clerical employees and the nursing staff on a regular basis as well as with the patients, as do unit employees. Prisco did not explain the nature of this interaction. It is thus unknown whether the interaction was of a technical or professional nature or of a nature related to unit employees.

I conclude that Respondent's records which categorize Owen and Chase as ''TRDs'' and ''professionals'' raise a presumption that they hold that position and were professional employees on the date of the election, despite some variation of that title elsewhere in the records. I find that the presumption was as not rebutted by clear, convincing evidence that they did not function as technical or professional employees. I find that the challenges to their ballots ought to be sustained.

7. and 8. Obscene ballots

The Union concedes that the ballots augmented with the obscene ''F'' word concedes the clear intent of the voter. I agree and conclude that they should be counted as valid ballots.

9. The double-marked ballot

One ballot had markings in both boxes.[5] Because of that, the Union argues that it is invalid. Respondent argues that the ballot is valid under the Board's policy ''to give effect to voter intent whenever possible,'' citing *Horton Automatics*, 286 NLRB 1413 (1987), and numerous other cases involving irregularly marked but intent clear ballots.

The yes box contained a lightly marked x covered by the kind of smudges caused by an inadequate eraser. I agree with the Respondent that the marking in the ''yes'' box is a smudged attempted erasure which was probably caused by the worn eraser head on the voting pencil. The mark in the ''no'' box is heavy, clear, more intense, and contains a double line on one leg of the ''x.'' Accordingly, I conclude that it was the clear intent of the voter to vote ''no.'' I therefore find that the challenge to this ballot is not meritorious and it ought to be counted as a valid vote cast against union representation.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices as found in the above decision, which unfair labor practices affect commerce within the meaning of the Act.

4. Katherine Gill, Charlotte Ricci, Linda Wilson, and Nancy Smith were eligible to vote in the election held in Case 34–RC–1258, and their ballots should be opened and counted. Sheila Owen and Jennifer Chase were not eligible to vote, and the challenges to their ballots should be sustained.

5. The three remaining ballots containing extraneous markings are valid ballots and should be counted as votes cast against the Union.

6. Neither the Union nor the Board agent has engaged in conduct which has interfered with the free choice of employees in the Board-conducted election in Case 34–RC–1258.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully terminated the employment of Katherine Gill, I recommend that Respondent be ordered to offer her immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position without prejudice to her seniority and other rights and privileges, and to make her whole for any loss of earnings suffered as a result of its unlawful conduct by payment of a sum equal to that which she would have earned absent the discrimination against her, with backpay and interest computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[5] As I informed counsel for all parties on May 2, 1995, directly or by message, the original ballot, G.C. Exh. 17, was not included in the original exhibit file by the reporter, nor is it included in the duplicate exhibit file. Inasmuch as its whereabouts is now unknown, I have relied upon an electronically reproduced copy of the exhibit made at the time of trial and my own recollection of the appearance of the markings on the original exhibit.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Mediplex of Connecticut, Inc., a wholly owned subsidiary of Sun Healthcare Group, Inc. d/b/a Mediplex of Milford, Milford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closure of its facility and loss of jobs if they select the New England Health Care Employees Union, District 1199, AFL–CIO as their collective-bargaining representative.

(b) Discharging employees because of their membership in or activities on behalf of the above-named Union or any other union, or because of other concerted activities protected by the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Katherine Gill immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings suffered as a result of its unlawful conduct in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Milford, Connecticut facility copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

All allegations in the complaint not found to be meritorious are dismissed. Case 34–RC–1258 is remanded to the Regional Director to open and count the ballots of Katherine Gill, Charlotte Ricci, Linda Wilson, and Nancy Smith, and to count as valid votes cast against union representation the three ballots containing extraneous markings and to issue an appropriate revised tally of ballots and appropriate certification.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''